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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA, a State agency, and LAWRENCE FUCHS, Executive Director of the Department of Revenue,
Petitioners,

v.

SHARE INTERNATIONAL, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

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58 pp

QUESTION PRESENTED

Whether the "substantial nexus" test of the Commerce Clause requires a vendor to have a "substantial physical presence" in a state before that state may impose upon the vendor a sales and use tax collection obligation?

PARTIES TO THE PROCEEDINGS

The Petititoners in this case, Appellants below, are the Florida Department of Revenue, and Lawrence H. Fuchs, Executive Director of the Florida Department of Revenue. The Respondent in this case, Appellee below, is Share International, Inc. Respondent has no parent company. Share International, Inc. is a Texas corporation incorporated in 1961 and owned by Dr. James W. Parker. Related through ownership is Parker Chiropractic Resource Foundation which is a Texas corporation owned by Dr. James W. Parker and his son Dr. Karl Parker.

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IN THE
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No. 96-_____

DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA, a State agency, and LAWRENCE FUCHS, Executive Director of the Department of Revenue,

Petitioners,

v.

SHARE INTERNATIONAL, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

The Florida Department of Revenue and Mr. Lawrence H. Fuchs, Executive Director of the Florida Department of Revenue, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Florida, in this case.

OPINIONS BELOW

The decision of the Second Judicial Circuit Court, in and for Leon County, Florida (Appendix "C") is an unreported decision. The opinion of the First District Court of Appeal of Florida (Appendix "B") is reported at 667 So. 2d 226 (Fla. 1st DCA 1995). The opinion of the Supreme Court of Florida (Appendix "A") is reported at 676 So. 2d 1362 (Fla. 1996).

JURISDICTION

The opinion of the Supreme Court of Florida was rendered on July 18, 1996. Jurisdiction of this Court to review the final opinion of the Supreme Court of Florida is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Commerce Clause, art. 1, sec. 8, cl. 3, of the United States Constitution.

STATEMENT OF THE CASE

Parker Chiropractic Resource Foundation ("PCRF") is a Texas corporation owned by Dr. James W. Parker and his son Dr. Karl Parker. PCRF began conducting educational seminars in 1951. PCRF held seminars in Miami Beach, Florida, in November of 1986, 1987, 1988, 1989, and 1991. These seminars usually lasted four (4) days, beginning on Thursday afternoon and ending Sunday morning. Both Dr. James W. Parker and Dr. Karl Parker were present at the seminars, acting as speakers and coordinators. Other speakers also addressed the attending chiropractors, who were both Florida residents and residents of other states.

Share International, Inc. ("Share") is a Texas corporation incorporated in 1961 and owned by Dr. James W. Parker, who is also Share's President and a director of the company. Dr. Karl Parker is a director and Vice-President of

Share. The only employee of Share is Dr. James Parker. Share engages in the business of the manufacture, distribution, and sale of supplies to chiropractic physicians. The majority of these products are paper goods. Share's principal place of business is Forth Worth, Texas.

As part of the seminars held by PCRF, Share brought to Florida and offered for sale between 500 and 1000 different items of the chiropractic supplies and products Share manufactured and sold. Both Dr. James W. Parker and Dr. Karl Parker were present at the seminars on Share's behalf to promote Share's products for sale at the seminars and through mail order.

Share contracted with PCRF to have PCRF's employees display, sell, receive cash, and take orders for Share, paying PCRF an administrative fee. PCRF would send 10-12 of its employees each year to the annual seminar in Florida to fulfill these functions. Any unsold products would be returned to Texas. For out-of-stock products or display items, the PCRF employees would take orders from the chiropractors present in Florida at the seminar for future delivery.

Share voluntarily registered with the Florida Department of Revenue ("Department") to collect sales and use tax and submitted reports of only its sales made at the seminars. The record showed the following amounts of taxable sales and tax collected in Florida during the audit period:

	Taxable Sales	Tax Collected
November 1986:	$195,860.80	$9,793.04
November 1987	$150,951.80	$7,547.59
November 1988	$118,263.50	$7,095.81
November 1989	$116,491.50	$6,989.49

Each of the above-stated amounts of direct Florida sales were made during the 4-day period each November. Of the approximately $3 million sold annually by Share, the reported Florida sales amounted to approximately 4.6% of Share's *total* annual sales. The amounts reported by Share did not include separate mail order sales to Florida residents. During the audit period, Share voluntarily continued its contact with Florida customers by mailing one catalog, one supplement, and approximately 15 fliers to its Florida customers.

In November 1990, the Department conducted an audit in Texas of Share's records. The audit covered the period December 1, 1985, though November 30, 1990. The Department discovered that Share had not collected and remitted to the Department the sales and use tax that should have been applied to sales and orders taken in Florida for later delivery and to mail order/direct sales made to Florida residents.[1]/ The Department concluded that Share had "substantial nexus" with Florida because Share: 1) was physically present in Florida in 1986, 1987, 1988, 1989, and 1991; 2) had agents, employees and/or representatives physically in Florida; 3) brought substantial unsold merchandise to Florida; 4) made sales and deliveries of Share's merchandise in Florida; 5) made sales and took orders in Florida for later delivery to Florida; and 6) made direct mail-order sales to Florida residents.

1/ The Department did not impose any assessment on Share for the sales made in Florida that were to be directly shipped from Texas to a state other than Florida.

The Department issued an assessment, in the amount of $77, 933.98, finding that Share had the duty to collect Florida sales and use tax on sales to Florida residents pursuant to Section 212.0596(2)(b) and (c), Florida Statutes. Share filed a protest to the assessment. The Department issued a Notice of Decision with respect to Share's protest on January 24, 1992. Share requested reconsideration of the Department's decision and the Department issued a Notice of Reconsideration on May 15, 1992, upholding the assessment.

Share filed its Complaint in Florida's Second Judicial Circuit on July 13, 1992. Share asserted that the Department's assessment was in violation of the Commerce Clause of the United States Constitution in that Share did not have "substantial nexus" with Florida allowing Florida to impose a sales and use tax collection duty on Share in accordance with the then recently decided decision of this Court in *Quill Corporation v. North Dakota,* 504 U.S. 298 (1992).

The trial court issued its Order (Appendix C) on November 16, 1993, declaring the Department's assessment of sales and use tax against Share as in violation of the U.S.

Constitution. The Department filed its Notice of Appeal on December 13, 1993. On August 21, 1995, the First District Court of Appeal issued its decision in the case (Appendix B). The District Court upheld the decision of the trial court finding that Share had insufficient "nexus" with Florida despite the physical presence of Share in Florida and the sales activity in this State. The District Court, however, believed the case presented an issue of great public importance and certified the following question to the Supreme Court of Florida:

> Whether, under the facts of this case, "substantial nexus" within the meaning set forth by the United States Supreme Court in *Quill Corporation v. North Dakota,* 504 U.S. 298, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992), and *National Bellas Hess, Inc. v. Department of Revenue of Illinois,* 386 U.S. 753, 87 S.Ct. 1389, 18 L.Ed.2d 505 (1967), exists which would permit Florida to require Share to collect sales and use taxes on all goods sold to Florida residents?

667 So. 2d, at 230. The Department also filed a Notice of Appeal on September 14, 1995. Review was granted by the Supreme Court of Florida on February 1, 1996.

On July 18, 1996, the Supreme Court of Florida issued its opinion (Appendix A) answering the certified question in the negative and affirming and adopting the opinion of the First District Court of Appeal. The court, in discussing the "substantial nexus" test under *Quill,* stated that "the law may require courts to fill in the gaps and give meaning to the terms 'slightest presence' and 'substantial nexus,' . . ." and then went on to state that the "bright-line" rule of *Bellas Hess*, reaffirmed in *Quill*

> only serves to clearly insulate from state taxation out-of-state vendors whose sole activities in the taxing state are mail order sales. If such a company has *additional connections* to the taxing state, then those connections must be analyzed under the "substantial nexus" test described above.

Department of Revenue v. Share International, Inc., 676 So. 2d 1362, 1363 (Fla. 1996).

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE SUPREME COURT OF FLORIDA CONFLICTS WITH PREVIOUS DECISIONS OF THIS COURT ON AN IMPORTANT FEDERAL QUESTION

The decision of the Supreme Court of Florida conflicts with this Court's decisions in *National Bellas Hess, Inc. v. Department of Revenue of Ill.*, 386 U.S. 753 (1967) and *Quill* on the important federal question of what constitutes "substantial nexus" under the Commerce Clause.[2] In *Bellas Hess*, as reaffirmed in *Quill*, this Court established a "bright line" test which would permit a state to compel a foreign vendor to collect sales and use tax if the vendor had physical

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[2] In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), this Court established a four-part test for determining the validity of state taxes under the Commerce Clause. Under this test, a tax will survive a Commerce Clause challenge so long as the "tax: 1) is applied to an activity with a substantial nexus with the taxing State; 2) is fairly apportioned; 3) does not discriminate against interstate commerce; and 4) is fairly related to the services provided by the State." *Id.* at 279.

presence in the taxing state and that physical presence was for the purpose of advancing the vendor's business in the taxing state.

The *Share* decision of the Supreme Court of Florida substitutes a new test of "substantial physical presence" in place of the "bright-line" "physical presence" test of *Bellas Hess* and *Quill*. Instead of a clear-cut situation under the "bright line" test, the Florida decision requires both subjective analysis and substantial litigation to establish just when the "substantial physical presence" is reached, thereby destroying this Court's goals of "settled expectations" for vendors and states alike and the very concept of a "safe harbor." The Florida decision reverts to the legal analysis utilized by the North Dakota Supreme Court and specifically rejected by this Court in *Quill*.

Quill is this Court's most recent and detailed pronouncement on the question of nexus and the ability of a state to require collection of sales and use tax by a foreign vendor. In *Quill*, this Court focused on the purpose served by the Commerce Clause: concern over the effects of state

regulation on the national economy. *Quill,* 504 U.S. at 312. In light of this concern, this Court has consistently ruled that the Commerce Clause prohibits discrimination and bars state regulations that unduly burden interstate commerce. *Id.* The "substantial nexus" test of the Commerce Clause principally seeks to avoid the placing of undue burdens on interstate commerce. As was noted in *Quill*, undue burdens upon interstate commerce resulting from state taxation may be avoided by either: 1) making a case-by-case evaluation of the actual burdens imposed; or 2) by the demarcation of a discrete realm of commercial activity that is free from interstate taxation. *Id.* at 314-315.

In *Bellas Hess* this Court selected the latter approach and established a "safe harbor" for foreign vendors "whose only connection with customers in the [taxing] State is by common carrier or the United States mail." *Bellas Hess,* 386 U.S. at 758, and *Quill,* 504 U.S. at 315. This admittedly artificial "bright-line" test accomplished the ends of the Commerce Clause by: 1) establishing a clear rule that was intended to eliminate unnecessary litigation encouraged by

case-by-case subjective analysis; 2) firmly establishing the boundaries of legitimate state authority to impose a sales and use tax collection obligation; and 3) encouraging "settled expectations" which would permit investment and growth in commercial activities. *Quill,* 504 U.S. at 315-316.

A state, however, was permitted to compel a vendor to collect and remit sales and use tax where the vendor chose to leave the "safe harbor" and physically enter a state through the presence of "a small sales force, plant, or office."[3] *Id.* at 315. This requirement has come to be commonly known as the "physical presence" requirement. The Court recognized the continued value of the "bright-line" "physical presence" test established in Bellas Hess and declined to adopt the subjective balancing test utilized by the North Dakota Supreme Court. *Id.* at 317-318. Additionally, while the Court did not adopt a

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[3] The *Quill* decision also noted two other decisions where this Court found sufficient "physical presence" that would permit a state to compel a vendor to collect and remit sales and use tax - *National Geographic Society v. California Bd. of Equalization,* 430 U.S. 551 (1977), and *Scripto, Inc. v. Carson,* 362 U.S. 207 (1960).

"slightest presence" test for determining "substantial nexus", *National Geographic Society v. California Bd. of Equalization*, 430 U.S. 551, 556 (1977), the Court also has not required a "substantial physical presence" in order for the "substantial nexus" test under the Commerce Clause to be met.

Thus, this Court allows states to impose sales and use tax collection requirements on foreign vendors when the vendors themselves choose to leave their "safe harbor" and do "more than communicate" with their customers in the taxing state by U.S. Mail or common carrier. Foreign vendors do "more than communicate" when they physically enter the taxing jurisdiction with the intent to engage in activity that advances the vendor's business in that taxing state.

Despite this Court's lengthy and detailed discussion in *Quill* of the "substantial nexus" test and the "bright-line" "physical presence" requirement, the Supreme Court of Florida misinterpreted the reasonings and holdings of *Bellas Hess* and *Quill*. The Florida Supreme Court added the new requirement that before the Department of Revenue may require a vendor to collect taxes, in spite of a vendor's physical presence in

Florida with the intent to advance the vendor's business activity in Florida[4], the Department would have to show subjective evidence of "substantial physical presence" before satisfying the "substantial nexus" test.

In discussing the holding of *Bellas Hess*, the Supreme Court of Florida stated that the "bright-line" standard

> only serves to clearly insulate from state taxation out-of-state vendors whose sole activities in the taxing state are mail order sales. If such a company has *additional connections* to the taxing state, then those connections must be analyzed under the "substantial nexus" test described above.

Share, 676 So. 2d at 1363. Thus, the court reasoned, a vendor will still be protected from a collection obligation even after the vendor has done more than communicate, has crossed the "bright line" by physically entering a taxing state and

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[4] At oral argument before the Supreme Court of Florida, Share's counsel admitted, upon being so questioned by the court, that Share had left the "safe harbor" and had entered Florida to do business but that was not enough to establish "substantial nexus."

conducting business activities, unless the state shows some unstated, in quality or quantity, additional connections to the state. Unfortunately, the Supreme Court of Florida did not define "substantial physical presence" or provide examples of what types of additional contacts were necessary to meet a "substantial physical presence" standard. The failure of the court to do this, however, is not surprising since such a standard is not the requirement established by this Court in *Bellas Hess* and *Quill*. The Florida Department of Revenue, after *Share*, must meet, instead of the "bright line" test, a "bright line" **plus** test, whatever the plus may be.

The Florida Supreme Court adoption of a "substantial physical presence" standard is a further conflict with *Quill*. The "substantial physical presence" test requires subjective analysis of all the physical presence contacts a vendor may have with a taxing state. This same sort of analysis was attempted by the states to subject vendors to the collection requirements. This Court rejected such an approach, instead relying on the long-standing "bright line" test. Where the states could not use subjective tests to enforce collection requirements, vendors

cannot now seek to use a subjective test to escape state collection requirements. A uniform "bright line" test must apply equally and uniformly to both states and business.

Thus, the decision of the Supreme Court of Florida is an inaccurate reading of the decisions of *Bellas Hess* and *Quill*. The court believed that as a result of *Quill* courts may be "required to fill in the gaps and give meaning to the terms 'slightest presence' and 'substantial nexus.'" *Share,* 676 So. 2d at 1363. As a result of this mistaken belief, the court applied its own subjective "substantial physical presence" standard. Rather than provide a respite from the case-by-case evaluation of burdens imposed upon each vendor, the Florida decision mandates such increased litigation, effectively destroying "settled expectations" and any certainty of where the "safe harbor" of *Bellas Hess* and *Quill* may lie.

The "bright-line" "physical presence" test serves a useful purpose for all parties by establishing a discrete realm of commercial activity free from state taxation. Florida's law must, in this situation, be consistent with the uniform rule of law set by this Court. Review by this Court is called for to

correct the mistaken interpretation by the Florida court of *Bellas Hess* and *Quill*.

II.

THE DECISION OF THE SUPREME COURT OF FLORIDA CONFLICTS WITH DECISIONS OF THE NEW YORK COURT OF APPEALS, THE SUPREME COURT OF ILLINOIS, AND THE SUPREME COURT OF RHODE ISLAND WHICH HOLD THAT A SUBSTANTIAL PHYSICAL PRESENCE IN A STATE BY A FOREIGN VENDOR IS NOT REQUIRED BEFORE A TAXING STATE MAY REQUIRE THE FOREIGN VENDOR TO COLLECT THE TAXING STATE'S SALES AND USE TAX

The decision of the Florida Supreme Court adopted a "substantial physical presence" standard for satisfying the "substantial nexus" test of the Commerce Clause. Not only is a "substantial physical presence" standard inconsistent with the holdings of this Court in *Bellas Hess* and *Quill*, it also is in conflict with decisions of sister states. These states have correctly interpreted and applied the holdings and reasoning of *Bellas Hess* and *Quill* and rejected any type of "substantial physical presence" standard.

In *Orvis Company, Inc. v. Tax Appeals Tribunal* , 86 N.Y.2d 165, 654 N.E.2d 954 (1995), *cert. denied sub nom, Vermont Information Processing, Inc. v. Comm'r*, __ U.S. __, 116 S.Ct. 518, 133 L.Ed.2d 426 (1995), the Court of Appeals of New York determined that the physical presence in New York of two Vermont vendors was sufficient for New York to impose upon those vendors an obligation to collect and remit sales and use tax. One vendor was Orvis Company, Inc. (Orvis), who was primarily a mail order vendor of outdoor equipment and clothing. Orvis also sold merchandise at wholesale to New York retail establishments and Orvis employees made visits to these retailers to discuss the sales of Orvis products.

The second Vermont vendor was Vermont Information Processing, Inc. (VIP), who marketed computer hardware and software to beverage distributors in New York, as well as nationwide. While most customer orders were filled through shipments by common carrier or the United States mail, employees of VIP made visits to VIP's New York customers. These visits to New York were to resolve VIP's New York

customers' problems and provide customer instruction on the use of the VIP software, and also to occasionally install software.

The Court of Appeals rejected these taxpayers' argument that a "substantial physical presence" was required before a state may require a vendor to collect sales and use tax. After noting the historical development of the "substantial nexus" test under the Commerce Clause, the court determined that a "substantial physical presence' standard was not a requirement of *Bellas Hess* and *Quill*. *Id.* at 176, 654 N.E.2d at 959-960. The court noted that such a requirement would destroy the "bright-line" rule this Court preserved in *Quill* when it declined to overrule *Bellas Hess* and would inevitably require a "case-by-case" evaluation of burdens imposed upon an interstate vendor. *Id.* at 177, 654 N.E.2d at 960. The Court of Appeals succinctly stated its understanding of the requirement this Court imposed in *Bellas Hess* and *Quill*:

> While a physical presence of the vendor is required, it need not be substantial. Rather, it must be demonstratibly more than a "slightest presence" (citation omitted). And it may be manifested by the presence in the taxing State

> of the vendor's property or the conduct of economic activities in the taxing State performed by the vendor's personnel or on its behalf.

Id. at 178, 654 N.E.2d at 960-961.

Similarly, the Illinois Supreme Court rejected efforts to impose a "substantial physical presence" standard in the case of *Brown's Furniture, Inc. v. Wagner*, 665 N.E.2d 795 (Ill. 1996), *cert. denied sub nom., Brown's Furniture, Inc. v. Zehnder*, 65 U.S.L.W. _____ , (No. 96-94) (U.S. October 7, 1996). Brown's Furniture was located in Missouri, just across the state border with Illinois. Illinois residents frequently made purchases from Brown's Furniture and Brown's Furniture delivered in Illinois, on a regular basis, purchases made by Illinois residents.

In rejecting a "substantial physical presence" standard, the Illinois Supreme Court acknowledged this Court's decision in *Quill* that required a physical presence within a state in order to meet the "substantial nexus" test of the Commerce Clause and specifically referred to the *Orvis* decision form New York as a recent example of an interpretation of the "substantial

nexus" test as set forth in *Quill*. *Wagner*, 665 N.E.2d at 802.

A third decision that determined what level of physical presence is necessary to constitute "substantial nexus" is *Koch Fuels, Inc. v. Clark*, 676 A.2d 330 (R.I. 1996), *petition for cert. filed*, 65 U.S.L.W. 3085 (U.S. Aug. 16, 1996) (No. 96-269).[5] Koch sold fuel oil to an electric generating plant located in Rhode Island. Koch had no employees or offices located in Rhode Island. Koch, however, retained title to the fuel oil while it was being delivered in common carriers to the pipeline flange of the electric generating plant. The Rhode Island Supreme Court took note of this Court's decisions in *Bellas Hess* and *Quill* and noted that in instances where a vendor did no more than communicate with customers by common carrier and mail, a vendor did not have "substantial nexus" with the taxing state. *Id.* at 333-334. Taking into consideration the nature of the circumstances present concerning the fuel oil

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[5] Although the actual tax at issue in this case was a gross-earnings tax imposed upon Koch, the Supreme Court of Rhode Island determined that this tax was correctly characterized as a sales or use tax. *Id.* at 333.

shipment and deliveries, the court had no difficulty in finding that Koch had sufficient contacts with and presence within Rhode Island to satisfy the "substantial nexus" test. *Id.* at 334.

All three of these cases recognize a significant factor that was either missed or misunderstood by the Supreme Court of Florida - this Court's decisions in *Bellas Hess* and *Quill* that state that activities beyond contact by common carrier and mail are not protected under the "substantial nexus" test.[6] When activities within their states exceeded these bounds, New York, Illinois, and Rhode Island did not look to a "substantial physical presence" standard, as did the Supreme Court of

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[6] While not directly addressing the issue here, a fourth case following the reasoning of *Quill* to determine "substantial nexus" was recently decided. The Supreme Court of Kansas upheld, against a Commerce Clause attack, a sales and use tax collection requirement on the Scholastic Book Clubs for selling books to school children through Kansas school teachers. *In the Matter of Scholastic Book Clubs, Inc.*, 920 P.2d 947 (Kan. 1996). The fact that the Book Club conducted sales activities to school children in Kansas through it teacher agents was enough to find "substantial nexus" under the *Quill* decision. *Scholastic Book Clubs, Inc.*, 920 P.2d, at 956-958.

Florida, in determining whether the "substantial nexus" test was satisfied. These courts did not require any kind of subjective balancing test of the type that was rejected by this Court in *Quill*. Instead, all three courts looked to see whether the vendor had a "physical presence" more than a "slightest presence." These courts did not require the "physical presence" to be "substantial." Both New York and Illinois also correctly noted the requisite "physical presence" "may be manifested solely by the presence in the taxing State of the vendor's property or the conduct of economic activities in the taxing State performed by the vendor's personnel or on its behalf." *Orvis,* 86 N.Y.2d at 178, 654 N.E.2d at 960-961, and *Brown's Furniture,* 665 N.E.2d at 802-803.

The decision of the Supreme Court of Florida adopts a "substantial physical presence" test, a test that has been rejected by three other states which have faced issues concerning interpretation of the "substantial nexus" test of the Commerce Clause. The Florida decision conflicts with the decisions reached in New York, Illinois, and Rhode Island. This Court's resolution of the conflict existing over the nexus issue in this

case is of vital importance and interest to both state taxing authorities and vendors who cross state lines. Review by this Court to eliminate this conflict is warranted and necessary.

CONCLUSION

The decision of the Supreme Court of Florida, in deciding an important federal question under the Commerce Clause of the United States Constitution, conflicts with this Court's decisions of *Quill* and *Bellas Hess* and with the decisions of the New York Court of Appeals in the case of *Orvis*, the Supreme Court of Illinois in the case of *Brown's Furniture*, and the Supreme Court of Rhode Island in the case of *Koch Fuels*. The petition for a writ of certiorari should be granted to bring uniformity again in the law of "substantial nexus."

Respectfully submitted,

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October 11, 1996

SUPREME COURT OF FLORIDA
Case No. 86,481

DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA, a State agency, and LAWRENCE FUCHS, Executive Director of the Department of Revenue,

Petitioners,

v.

SHARE INTERNATIONAL, INC.,

Respondent.
_____/

(ANSTEAD, J.)

We have for review *Florida Department of Revenue v. Share International. Inc.*, 667 So. 2d 226 (Fla. 1st DCA 1995), in which the First District passed upon the following question certified to be of great public importance:

> Whether, under the facts of this case, "substantial nexus" within the meaning set forth by the United States Supreme Court in *Quill Corporation v. North Dakota*, 504 U.S. 298, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992), and *National Bellas Hess, Inc. v. Denartment of Revenue of Illinois*, 386 U.S. 753, 87 S. Ct.

> 1389, 18 L. Ed. 2d 505 (1967), exists which would permit Florida to require Share to collect sales and use taxes on all goods sold to Florida residents?

Share, 667 So. 2d at 230. We have jurisdiction. Art. V, § 3(b)(4), Fla. Const. We answer the certified question in the negative. Further, because the district court's opinion and analysis are consistent with our views, we approve the district court opinion and adopt it as our own.

Share International, Inc. (Share) is a Texas corporation which engages in the business of manufacturing and distributing chiropractic supplies. Share, which sells its products primarily through direct mail solicitation out of its principal offices in Fort Worth, Texas, has no offices in Florida and no employees or agents residing in the state. Dr. James Parker is the president, director, sole employee and sole shareholder of the company. Dr. Karl Parker is a director and vice president of the company.

For three days in November in the years 1986, 1987, 1988, 1989, and 1991, James and Karl Parker were present at a national seminar held in Florida and served as speakers and coordinators. Approximately eighty-four percent of the chiropractors in attendance were from other states. The seminars were conducted by the Parker Chiropractic Resource Foundation (Foundation), also a Texas corporation, which is in the business of providing educational information and support for chiropractors. The Foundation, owned by James and Karl Parker, has no offices, employees, or agents in any state other than Texas. During the Florida seminars,

Share's products were displayed in an adjacent room and were available for purchase. Share registered with the Florida Department of Revenue (Department) and collected and remitted to the Department sales tax on items sold in Florida during the seminars. Other than its regular mail order sales, Share had no other contact with the State of Florida.

Under these facts, the district court upheld a trial court ruling that Share did not have a sufficient presence in the State of Florida, under controlling United States Supreme Court decisions, to permit the state to require Share to collect and remit Florida taxes on mail order sales to Florida residents. In a thorough analysis by Judge Barfield, the district court opinion discussed the controlling United States Supreme Court decisions and correctly applied their holdings to the facts of this case as established in the trial court.

Principally relying on *National Geographic Society v. California Board of Equalization,* 430 U.S. 551, 97 S.Ct. 1386, 51 L.Ed.2d 631 (1977), the district court held that the ``slightest presence" of an out-of-state mail order company within the state was insufficient to permit the state, consistent with the Commerce Clause of the United States Constitution, to enforce a use tax against the out-of-state company. Rather, the court held the state may only enforce such a tax against an out-ofstate company whose activities create a substantial nexus to the state. See *Ouill Corp. v. North Dakota*, 504 U.S. 298, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992). While this law may require courts to fill in the gaps and give meaning to the terms ``slightest presence" and ``substantial nexus," it is apparent that those are the standards

established by the Supreme Court. We find no error in the district court's interpretation and application of those terms here.

Further, we agree with the district court that the bright line test adopted in *National Bellas Hess, Inc. v. Illinois Department of Revenue*, 386 U.S. 753, 87 S.Ct. 1389, 18 L.Ed.2d 505 (1967), only serves to clearly insulate from state taxation out-of-state vendors whose sole activities in the taxing state are mail order sales. If such a company has *additional connections* to the taxing state, then those connections must be analyzed under the "substantial nexus" test discussed above.

Accordingly, we answer the certified question in the negative and approve the decision of the district court. (KOGAN, C.J., and OVERTON, SHAW, GRIMES, HARDING and WELLS, JJ., concur.)

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
FIRST DISTRICT

FLORIDA DEPARTMENT OF REVENUE
and J. Thomas Herndon, Executive Director
of the Department of Revenue, State of Florida,

Appellants,

v. Case No. 93-4093.

SHARE INTERNATIONAL, INC.,

Appellee.
_____/

BARFIELD, Judge.

The Department of Revenue appeals a trial court order in which the trial judge declared the Department's assessment of sales/use taxes against Share International, Inc. [Share] to be unconstitutional. We affirm.

Share is a Texas corporation which engages in the business of manufacturing and distributing chiropractic supplies. Share sells its products primarily through direct mail solicitation out of its principal offices in Fort Worth, Texas. Dr. James Parker is the president, director, sole employee and sole shareholder of the company. Dr. Karl Parker is a director and vice-president of the company.

For three days in November in the years 1986, 1987, 1988, 1989, and 1991, James and Karl Parker were present at seminars or conventions held in Florida, acting in the capacity of speakers and coordinators. The seminars are conducted by the Parker Chiropractic Resource Foundation [Foundation], also a Texas corporation, which is in the business of providing educational information and support for chiropractors. The Foundation, owned by James and Karl Parker, has no offices, employees, or agents in any state other than Texas.

During the Florida seminars, Share's products were displayed in an adjacent room and were available for sale. Share registered with the Department and collected and remitted to the Department sales tax on items sold in Florida during the seminars. Share did not, however, collect Florida sales taxes on sales or orders made by telephone or mail from residents in Florida but delivered by mail or common carrier or on orders received during the Florida seminars but delivered by mail or common carrier at a later date. Share generated approximately three million dollars in annual gross revenue during the years at issue, with the vast majority earned from mail order sales. Approximately 4.6% of the annual sales resulted from products sold directly to chiropractors at seminars held in Florida.

In November of 1990, the Department conducted an audit of Share's records for the period December 1, 1985 through November 30, 1990. The Department discovered that Share had not collected and remitted to the Department tax on orders taken in Florida
and on mail order sales to Florida residents. The Department

decided that Share had "substantial nexus" with Florida based on presence in the state during the seminars and the sale of products during these periods of time. The Department issued a final assessment in the amount of $77,933.98, determining that Share had the duty to collect Florida tax on all sales to Florida residents pursuant to Section 212.0596, Florida Statutes.

Share timely filed a protest to the assessment. The Department issued a Notice of Decision upholding the assessment. Share then timely filed a complaint in circuit court challenging the assessment. The trial judge concluded that Share had not created a substantial nexus with Florida so as to provide the state with authority, consistent with the Commerce Clause, to require Share to collect and pay taxes on the mail order sales it makes to Florida residents and declared the assessment unconstitutional.

The Department argues that Share purposefully availed itself of Florida's economic market, that Share's contacts were not casual or random, and that Share came to Florida for sales and showed a continuing pattern of physical presence in the state by soliciting products and soliciting business in Florida at each of the seminars. The Department contends that the trial judge misinterpreted Supreme Court decisions construing the Commerce Clause. The Department notes that the Supreme Court has never required permanent physical presence in order to establish a substantial nexus with a state which would allow the state to require collection and remittance of tax on sales to residents and asserts that what is required is that a vendor have employees or agents in a state, have its products in a state, or make sales in a state

and that the physical presence be coupled with the intent to have the opportunity for financial gain for the vendor in the taxing state.

In *National Bellas Hess, Inc. v. Illinois Department of Revenue*, 386 U.S. 753, 87 S.Ct. 1389, 18 L.Ed.2d 505 (1967), Bellas Hess was a mail order house with its principal place of business in North Kansas City, Missouri. The company had neither outlets nor sales representatives in Illinois. The Illinois Department of Revenue sought to require the company to collect and pay Illinois use taxes. All of the contacts which the company had with Illinois were via mail or common carrier. Twice a year catalogues were mailed to active or recent customers throughout the nation. The catalog mailings were supplemented by advertising flyers which were occasionally mailed to past or potential customers. Orders were mailed by customers and accepted in Missouri.

The Supreme Court determined that Illinois could not impose the burden of collecting the state's use tax on Bellas Hess. It was noted that the power of a state to impose collection responsibility had been upheld in cases when sales were arranged by local agents in the taxing state and when the mail order seller maintained local retail outlets, but "the Court has never held that a State may impose the duty of use tax collection and payment upon a seller whose only connection with customers in the State is by common carrier or the United States mail." 386 U.S. at 758, 87 S.Ct. at 1392.

In *National Geographic Society v. California Board of Equalization*, 430 U.S. 551, 97 S.Ct. 1386, 51 L.Ed.2d 631 (1977), National Geographic Society, a nonprofit

educational and scientific corporation of the District of Columbia, maintained two offices in California that solicited advertising copy for the Society's monthly magazine. These two offices performed no activities related to the Society's operation of mail-order business for the sale from the District of Columbia of maps, globes, books, etc. Orders for these items were mailed directly to the District of Columbia headquarters on coupons or forms enclosed with announcements mailed to Society members and magazine subscribers. Payment for items ordered was mailed with the order or the customer was billed after receipt of the merchandise. The issue presented was whether the Society's activities at the offices in California provided sufficient nexus between the Society and the state, as required by the Commerce Clause, to support the imposition upon the Society of a use-tax collection liability on sales of merchandise to California residents.

The California Supreme Court concluded that the "slightest presence" of the seller in California established sufficient nexus between the state and the seller constitutionally to support imposition of the duty to collect and pay the tax. *National Geographic Society v. Board of Equalization*, 16 Cal.3d 637, 128 Cal.Rptr. 682, 547 P.2d 458 (1976). The Supreme Court determined that the Society's continuous presence in the state, comprised of the maintenance of two offices in the state and solicitation by employees assigned to those offices of advertising copy in the range of $1 million annually, established a much more substantial presence than the expression "slightest presence" connoted and that such presence rendered constitutional the

obligations imposed upon the Society to collect and remit the tax. The Supreme Court stated that affirmance was not to be understood as implying agreement with the California Supreme Court's "slightest presence" standard of constitutional nexus. (FN1)

In *Quill Corporation v. North Dakota*, 504 U.S. 298, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992), the Supreme Court was again faced with the issue of whether a state could require an out-of-state mail-order house that had neither outlets nor sales representatives in the state to collect and pay a use tax on goods purchased for use within the state. Quill is a Delaware corporation which sells office equipment and supplies. None of its employees work or reside in North Dakota. Quill solicits business through catalogs and flyers, advertisements in national periodicals, and telephone calls. Merchandise sold to North Dakota customers is delivered by mail or common carrier from out-of-state locations. The state supreme court declined to follow Bellas Hess after concluding that "the tremendous social, economic, commercial, and legal innovations" of the past quarter-century had rendered its holding obsolete. *State By and Through Heitkamp v. Quill*, 470 N.W.2d 203, 208 (N.D.1991).

In reversing the state court, the Supreme Court noted that under the four-part test set forth in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977), a tax would be sustained against a Commerce Clause challenge so long as the

"tax (1) is applied to an activity with a

> substantial nexus with the taxing State, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the State." 430 U.S., at 279, 97 S.Ct., at 1079. *Bellas Hess* concerns the first of these tests and stands for the proposition that a vendor whose only contacts with the taxing State are by mail or common carrier lacks the "substantial nexus" required by the Commerce Clause.

504 U.S. at 311, 112 S.Ct. at 1912. The Court rejected the notion that evolution of its cases indicated that the Commerce Clause ruling of Bellas Hess was no longer good law. The Court stated the bright-line rule of Bellas Hess furthers the ends of the dormant Commerce Clause by creating a safe harbor for vendors whose only connection with customers in the taxing state is by common carrier or mail. It was noted that the rule, like other bright-line tests, appears artificial at its edges: "whether or not a State may compel a vendor to collect a sales or use tax may turn on the presence in the taxing State of a small sales force, plant, or office." 504 U.S. at 315, 112 S.Ct. at 1914. The majority felt, however, that the artificiality was more than offset by the benefits of a clear rule which encouraged settled expectations.

It appears clear from Supreme Court decisions that an out-of-state seller whose only connection with customers in the taxing state is by common carrier or mail cannot be required to collect and remit tax on sales to residents of the

taxing state, and that out-of-state sellers who maintain a continuing presence in the state by one or more full-time or part-time employees can be required to collect and remit such a tax. The case before us does not present either factual situation.

The trial judge found that the chiropractors in attendance at the Florida seminars were from various states throughout the country, and had pre-registered based on information previously received. Internal marketing studies conducted by Share indicated that normally only 16% of the attendees at its Florida seminar were residents of Florida, and the remaining 84% came from outside the state. The seminars were specifically held in Florida during the winter months for the purpose of targeting chiropractors who practice in the northeastern United States and Canada. Many of the chiropractors present at the seminars were long-standing customers of Share, and had been purchasing products from Share for years through the catalogue. The trial judge determined that Share did not create a customer base in Florida during its presence at the seminars and did not exploit the consumer market in Florida.

The Department correctly notes that the Supreme Court has never required permanent presence in the state to establish "substantial nexus" for purposes of the Commerce Clause. We reject, however, the Department's argument that once an out-of-state vendor crosses the "bright-line" established in Bellas Hess by doing anything more than communicate with its customers by mail or common carrier that it will be liable to the taxing state to collect its sales or use taxes. If the "bright-line" is crossed and the out-of-state

vendor no longer falls within the safe harbor, it must then be determined whether the vendor's activities within the state establish a substantial nexus with the taxing state such that imposing the duty to collect and remit tax on sales to residents of the taxing state does not violate the Commerce Clause.

We conclude that the presence in the state for approximately three days each year of Share employees and products, under the circumstances presented in this case, does not establish a substantial nexus which will permit the state to impose on Share the duty to collect and remit taxes on mail-order sales to Florida residents. Accordingly, the order on appeal is affirmed. Because we feel this case presents an issue of great public importance, we certify the following question to the Florida Supreme Court:

> Whether, under the facts of this case, "substantial nexus" within the meaning set forth by the United States Supreme Court in *Quill Corporation v. North Dakota*, 504 U.S. 298, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992), and *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753, 87 S.Ct. 1389, 18 L.Ed.2d 505 (1967), exists which would permit Florida to require Share to collect sales and use taxes on all goods sold to Florida residents?

KAHN, J., and SHIVERS, Senior Judge, concur.

> FN1. The Supreme Court noted that in prior decisions the requisite nexus was held to be shown in cases where the out-of-state sales were arranged by the seller's local agents working in the state, in cases of maintenance in the state of local retail store outlets by out-of-state mail-order sellers, and in the case of an out-of-state company that had 10 salesmen conducting continuous local solicitation. *See Felt & Tarrant Co. v. Gallagher*, 306 U.S. 62, 59 S.Ct. 376, 83 L.Ed. 488 (1939); *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 61 S.Ct. 586, 85 L.Ed. 888 (1941); *Scripto, Inc. v. Carson*, 362 U.S. 207, 80 S.Ct. 619, 4 L.Ed.2d 660 (1960). Maintenance in the taxing state of a single employee, an engineer whose office was in his home and whose primary responsibility was to consult with a customer regarding its anticipated needs for the out-of-state supplier's product, established a sufficient relation to activities within the state to support imposition of a gross receipts tax. *Standard Pressed Steel Co. v. Washington Rev. Dept.*, 419 U.S. 560, 95 S.Ct. 706, 42 L.Ed.2d 719 (1975).

IN THE CIRCUIT COURT OF THE 2ND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY, FLORIDA
GENERAL JURISDICTION DIVISION

SHARE INTERNATIONAL, INC.,

Plaintiff,

v. CASE NO. 92-2918

DEPARTMENT OF REVENUE, STATE OF FLORIDA and J. THOMAS HERNDON, Executive Director of the Department of Revenue, State of Florida,

Defendants.

FINAL JUDGMENT

THIS CAUSE came on for trial on October 13, 1993, and the Court, after having heard the argument of counsel, having heard the evidence and testimony presented by the parties, having reviewed the stipulated facts, and being otherwise duly advised I the premises, it is hereby

ORDERED AND ADJUDGED as follows:

FINDINGS OF FACT

1. Plaintiff Share International, Inc. ("Share") is

a Texas corporation which engages in the business of manufacturing and distributing chiropractic business forms and miscellaneous supplies. Share has one employee, Dr. James W. Parker, who is also the President, Director and sole shareholder of the company. Dr. Karl Parker, the son of James W. Parker, is a Director and Vice President of the company.

2. Share primarily sells its products through direct mail solicitation out of its principal offices in Fort Worth, Texas. Share has no offices or employees in Florida, or in any state other than Texas.

3. In order to facilitate the sale of its products, Share mails product catalogs to chiropractors throughout the United States, Canada and Europe. Some of these chiropractors reside within the State of Florida. Share also mails occasional fliers to its customers. During the period from December 1985 through November 1990, Share mailed only one catalogue to its customers, and approximately twelve (12) fliers. Share does not utilize telemarketing or direct advertising to sell its products.

4. The names or the chiropractors who receive the catalogs are obtained by Share from various medical associations and from mailing lists purchased from many different sources.

5. Share earns approximately $3 million in gross revenue each year from the sale of its products. The vast majority of these revenues are earned from mail order sales. However, approximately 4.6% of Share's annual sales result from products sold directly to chiropractors at seminars held in the State of Florida.

6. These seminars are held and conducted by the Parker Chiropractic Resource Foundation ("Parker"), also a

Texas corporation, which is in the business of providing educational information and support for chiropractors throughout the world. Parker also conducts its business out of its offices in Fort Worth, Texas, and has no employees, offices or agents in any other state, including Florida.

7. Parker began conducting seminars in 1951. Then ten years later, in 1961, Share was incorporated and began selling its products. Dr. James W. Parker and Dr. Karl Parker each own a 50% interest in Parker, and are also officers and directors of the company. As part of its operations, Parker conducts seminars throughout the United States and internationally.

8. In November of years 1986, 1987, 1988 and 1989, Parker held seminars in Miami Beach, Florida. The seminars lasted approximately three (3) days, beginning on Thursday afternoon, and ending Sunday morning. Both Dr. James W. Parker and Dr. Karl W. Parker were present at the seminars as representatives of Parker, and were acting as speakers and coordinators of the seminars. They were also present on Share's behalf to promote Share's products and its mail order business. No other employees or officers of Share were present within the State of Florida during the seminars. Neither Parker nor Share employees were present in Florida except during such three-day period each year.

9. The chiropractors in attendance at the seminars were from various states throughout the country, and had pre-registered based on information previously received. Internal marketing studies conducted by Share indicated that normally only 16% of the attendees at its Florida seminar were residents of Florida, and the remaining 84% came from outside the State. The seminars were specifically held in Florida during the winter months for the

purpose of targeting chiropractors who practice in the northeastern United States and Canada. The seminars were geared toward educating the chiropractors by providing them with practical information that they could utilize in their chiropractic practices and to promote Share's products for mail order business.

10. As part of the seminar, Share offered for sale the chiropractic supplies and products manufactured by it. These products and supplies were displayed in a separate room that would be frequented by the chiropractors on a volunteer basis throughout their stay at the seminar. No sales agents of Share were present at the seminars to sell the products. Instead, Share contracted with Parker to have the products displayed on shelves or tables, with Parker employees operating cash registers to facilitate the sales transactions Parker consummated on Share's behalf.

11. Share paid Parker an annual administrative fee for providing the services of these employees at the seminar, as well as other miscellaneous services that were performed throughout the year. The employees' services were reimbursed on an hourly basis, and were in no way based on a percentage of sales made at the seminar.

12. In 1986, approximately $200,000 in products were sold at the seminars. In 1987, approximately $150,000 in products were sold. In years 1988 and 1989, approximately $120,000 in products were sold. Share registered with the State, and collected and paid taxes to the State of Florida for all of its products sold during these years at the seminars. The taxes were paid by filing a monthly tax return with the State of Florida for November of each year in which a seminar was held in Florida.

13. Many of the chiropractors present at the

seminars in Miami Beach were long-standing customers of Share, and had been purchasing products from Share for years through the catalogue. Additionally, many of the chiropractors bought their annual supply of Share products while at the seminars. Share had an existing, established customer base who attended the seminars and who purchased goods at the seminars. Share did not create a customer based in Florida during its presence at such seminar.

14. Parker did not conduct or hold a seminar in the State of Florida at any time during the year 1990. In fact, Parker's seminar during that year was held in the Bahamas. Share was also not present within the State of Florida at any time during the year 1990, through its agents or otherwise, and did not display its products in the State during that year. Of course, Share continued to sell its products to chiropractors residing in Florida through mail order catalogues during the year 1990, as well as the previous years of 1985 through 1989.

15. In November of 1990, the Florida Department of Revenue ("the Department") conducted an internal audit of Share's operations. The audit covered the period from December 1, 1985 through November 30, 1990. During the audit, the Department found that Share had been selling through the mail its products to Florida residents and that sales tax was not being collected and paid on these sales. After the audit was concluded, the Department issued a tax assessment to Share in the amount of $77,933.98 for sales and use tax, plus interest and penalties, against all mail order sales made to Florida residents during the years 1986, 1987, 1988, 1989 and 1990.

16. The basis of the Department's tax assessment against the mail order sales was pursuant to the authority of

Chapter 212 of the Florida Statutes. The amount of the assessment was calculated by the Department based on the additional sales made to Florida chiropractors through mail solicitation during the five years at issue. A formal protest was filed by Share, but the assessment was affirmed. The present action thereafter ensued.

17. In its Complaint, Share argues that the assessment of sales tax against the mail order sales made to chiropractors in the State of Florida during the period from December, 1985 through November, 1990 is unconstitutional by virtue of the recent Supreme Court decision of Quill Corp. v. North Dakota By and Through Heitkamp, 112 S.Ct. 1904 (1992).

18. A final trial was held before this Court on Wednesday, October 13, 1993. Both sides presented evidence and legal argument in support of their respective positions.

CONCLUSIONS OF LAW

19. The issue involved in this case is whether the State of Florida has authority to require Share to collect and pay sales and use tax on the mail order sales made to residents within the State of Florida.

20. The issue is controlled by the two-part test set forth in Quill. First, the foreign corporation must have sufficient minimum contacts with the taxing state to unsure that the imposition of the sales tax does not offend the protections afforded by the Due Process Clause of the United States Constitution. Id., at 1909-1912; see also National Bella Hess, Inc. v. Dept. Of Revenue of the State of Illinois, 87 S.Ct. 1389, 1391 (1967). Second, the tax assessment must not violate the Commerce Clause of the Constitution. Quill, 112 S.Ct. at 1912. If the corporation sought to be

taxed has a "substantial nexus" with the taxing state, the Commerce Clause is satisfies. Id.

21. "Substantial nexus" exists only if the foreign corporation is present within the state conducting the activity sought to be taxed. Quill, 112 S.Ct. at 1916 (affirming doctrine and principles first established in the Bella Hess decision). Moreover, the presence in the State must be real, and cannot be slight or based on insubstantial activity. National Geographic Society v. California Bd. Of Equalization, 97 S.Ct. 7386 (1977); see also Miller Bros. Co. v. State of Md., 74 S.Ct. 535 (1954).

22. The display of its products by Share during three days at a seminar is not enough to create a "substantial nexus" so as to allow the imposition of a sales tax against all future mail order sales made within the State of Florida.[1]

23. Share has no offices in the State of Florida out of which it conducts business. Moreover, Share has no employees or agents permanently residing within Florida to continuously assist in the mail order sales conducted in the State. Without a continuing physical presence, the assessment of a tax against the mail order activities is unjustified and violates the Commerce Clause.

1

Systematic and continuous solicitation of sales through the mail is the type of activity that will satisfy the requirements of the Due Process Clause. Quill, 112 S.Ct. at 1911. There is a question as to whether Share's mailing of one catalogue and 12 fliers during the five year period would be sufficient activity to satisfy the Due Process Clause. However, this Court does not have to address this issue by virtue of its finding that there is no "substantial nexus."

24. Registration and payment of taxes on certain sales or transactions is not dispositive of whether a "substantial nexus" exists. See State of Nevada v. Obexer & Son, Inc., 660 P.2d 981 (Nev. 1983). Thus, the fact the Share had registered with the State of Florida and paid taxes on those sales made at the seminars is not a factor to support the substantial nexus requirement.

25. Moreover, the limited presence of James or Karl Parker ("Parkers") at the seminar for three days each year will not suffice. The Parkers were present at the seminar primarily to educate other chiropractors and to promote Share's mail order business. Additionally, and secondarily, the Parkers came into the State on Share's behalf to personally deliver some goods, or assist in this endeavor. But this type of presence is insufficient. See Miller Bros., 74 S.Ct. at 540 (delivery of goods within taxing state through use of own trucks and employees not sufficient nexus); see also L.L Bean, Inc. V. Commonwealth of Penn., 516 A. 2d 820, 825 (Penn. 1986)(agents and employees of foreign corporation traveling into taxing state to assist retailer in displaying goods not enough to create substantial nexus). Additionally, the presence of Share's goods within the State for those three days each year does not create a "substantial nexus" with the State. Cally Curtis Co. v. Groppo, 572 A.2d 302 (Conn. 1990)(films located within the state for 3 days was de minimis and not substantial). Thus, the presence of the goods in the State, along with the presence of James or Karl Parker is not sufficient to create a substantial nexus with Florida.

26. Moreover, the use of Parker employees to work the registers within the rooms where the products are displayed is likewise not enough to create a nexus within the

State. Share's use of these Parker employees, for three days in this state, is not the type of permanent presence needed to create a nexus with the state. Cf. Scripto, Inc. v. Carson, 80 S.Ct. 619 (1960) (permanent presence in state of independent contractors/salesmen continuously soliciting orders sufficient to create nexus to support sales tax); National Geographic, 97 S.Ct. 7386 (two local offices in the state); Standard Pressed Steel Co. v. Wash. Dept. of Revenue, 419 U.S. 560 (1975) (one employee permanently working in taxing state).

27. Also, the Parker employees did nothing to further Share's market presence within the State of Florida. The Parker employees merely collected money from paying customers, and did not solicit further customers while in the state. As noted above, most of the chiropractors present at the seminar were from out of state, and had bee long-standing customers of Share. Cf., Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue, 107 S.Ct. 2810 (1987) (independent contractor in state engaged in activity to further market share within state of foreign corporation). Thus, there was no "exploitation of the consumer market" in Florida by these employees. Miller Bros., 74 S.Ct at 540. Dr. James Parker and Dr. Karl Parker were present in Florida for three days each year, both as Parker employees and Share employees. Both of these doctors were present in Florida to educate chiropractors from many states, who had registered in advance from their home states. Both of these doctors were also present to promote Share products to such doctors. The Parkers were not engaging in any activities designed to solicit business from any Florida chiropractor. The sole contact with Florida customers occurred if a Florida chiropractor had pre-registered to attend the seminar. The Parkers did not exploit the consumer market in Florida.

28. Thus, based on the foregoing, Share has not created a "substantial nexus" with the State of Florida so as to provide the State with authority to require Share to collect and pay sales and use tax on the mail order sales it makes in the State.

29. Accordingly, the tax assessment in the amount of $77,933.98 constitutes an undue burden on interstate commerce and is therefore unconstitutional. Therefore, judgment is entered in favor of Share, and the Department shall take nothing.

30. This Court retains jurisdiction over this matter to consider the issue of entitlement to attorneys fees and costs.

DONE AND ORDERED in Chambers, at Tallahassee, Leon County, Florida, this _____ day of November, 1993.

_____

_____

L.

RALPH SMITH, JR., Circuit Judge

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(2)

No. 96-647

In The

Supreme Court of the United States

October Term, 1996

THE DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA, a State Agency, and LAWRENCE FUCHS, Executive Director of the Department of Revenue,

Petitioners,

vs.

SHARE INTERNATIONAL, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Florida

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QUESTION PRESENTED

1. WHETHER RECONSIDERATION SHOULD BE GIVEN BY THIS COURT TO THE DECISION BELOW WHICH PROPERLY APPLIED THE DOCTRINES ENUNCIATED IN *QUILL* AND CONCLUDED THAT THE PRESENCE OF A VENDOR'S PRODUCTS AT A SEMINAR IN THE STATE OF FLORIDA FOR THREE DAYS EACH YEAR FAILS TO SATISFY THE "SUBSTANTIAL NEXUS" REQUIREMENT OF THE COMMERCE CLAUSE.

LIST OF PARTIES

Pursuant to Rule 29.1 of the Rules of this Court, respondent Share International, Inc. states that it has no parent corporation or subsidiaries.

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Orvis Co., Inc. v. Tax Appeal Tribunal, 86 N.Y.2d 165, 86 N.E.2d 954 (1995), *cert. denied, Vermont Information Processing, Inc. v. Commissioner*, ___ U.S. ___, 116 S.Ct. 518 (1995) 10, 11, 12

Quill Corp. v. North Dakota By and Through Heitkamp, 504 U.S. 298 (1992) ..... *passim*

Scripto, Inc. v. Carson, 362 U.S. 207 (1960) 5, 8

RESPONDENT'S BRIEF IN OPPOSITION

The respondent Share International, Inc. ("Share") respectfully requests that this Court deny the petition for writ of certiorari filed by the petitioners The Department of Revenue of the State of Florida, a State agency, and Lawrence Fuchs, Executive Director of the Department of Revenue (collectively "the Department"). The petition seeks review of the Florida Supreme Court decision reported at 676 So.2d 1362 (Fla. 1996).

I. STATEMENT OF THE CASE

This case involves the constitutionality of a state sales tax assessment against the mail order sales of Share, a non-resident corporation. The issue was decided in favor of Share by the lower courts in light of the rulings in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), and other controlling precedent.

A. Factual Background

Share is a Texas corporation which manufactures and sells chiropractic supplies consisting primarily of business forms and educational materials. The company is privately owned and operated by two individuals: Dr. James William Parker, who is the only employee of Share, and his son, Dr. William Karl Parker. Share conducts business out of its offices in Ft. Worth, Texas, and has no offices, agents, officers or employees in any other state.

Most of Share's business is conducted by direct mail through the use of catalogs and occasional fliers. A small amount, or approximately four (4%) percent, of Share's

gross sales each year result from products sold directly to physicians and doctors at educational seminars conducted by the Parker Chiropractic Resource Foundation ("the Foundation"), throughout the United States and Canada. The Foundation is an unaffiliated corporation owned by Dr. James Parker. Dr. Karl Parker is the vice president of the Foundation.

During the month of November in years 1986, 1987, 1988 and 1989, a Foundation seminar was held in Miami Beach, Florida (hereinafter referred to as "the seminars") each lasting three (3) days. Approximately 84% of the attendees at the seminar were from states other than Florida. Both James and Karl Parker were present at the seminars and served as speakers and coordinators on behalf of the Foundation. During the seminars, Share's products and supplies were displayed and available for purchase. No salespersons or employees of Share were present at the seminars to sell the products or solicit sales. Rather, Foundation employees were on hand to operate the cash registers and facilitate the transactions. Share registered with the Department, and collected and paid taxes to the State of Florida for sales made during the seminars. Share had no further contact with the State other than its direct mail activities.

In November of 1990, the Department conducted an internal audit of Share's operations for the period from December 1, 1985 through November 30, 1990. After the audit was concluded, the Department issued a tax assessment to Share in the amount of $77,933.98 for sales tax on those products sold within the State during the audit period by direct mail solicitation. A formal protest was filed by Share, but the assessment was affirmed. Share

thereafter filed its action for declaratory relief seeking to have the assessment declared unconstitutional.

B. Proceedings Below

After a full trial where all the evidence was presented, the lower court concluded that Share had no substantial nexus with the State of Florida and ruled the tax unconstitutional. This conclusion was based upon the lower court's interpretation of the *Quill* decision and other controlling precedent, as well as its finding that Share had no offices in the State of Florida, or any employees or agents permanently residing within the State. The trial court further found that neither the Parkers or Foundation employees were present within the State of Florida to solicit sales from its residents or exploit Florida's commercial market.

The Department appealed the trial court judgment, and the First District Court of Appeal affirmed. The appellate court held that the decisions of the United States Supreme Court, including *Quill*, supported the conclusion that a non-resident vendor must have a continuing presence within the taxing state before a substantial nexus will be found to exist. The court further held that the "bright line" test first enunciated in *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967), and later adopted in *Quill*, simply creates a safe harbor, free from taxation, for those vendors who do no more than communicate with its customers by mail or common carrier, and does not conversely require automatic taxation if the vendor has limited additional

contacts with the taxing state. The appellate court certified the question to the Supreme Court of Florida.

The Supreme Court of Florida agreed with the appellate court's conclusions, both legal and factual, and adopted the opinion as its own. The Supreme Court held that, consistent with *Quill* and *Bellas Hess*, a vendor who does more than communicate by mail or common carrier with residents of the taxing state will be subject to a factual determination of whether its activities satisfy the substantial nexus test of the Commerce Clause. The Department has now filed the subject petition for writ of certiorari.

II. REASONS WHY THE PETITION SHOULD BE DENIED

The petition for writ of certiorari is without merit and should be denied because the decision below was correct and is entirely consistent with the applicable decisions of this Court. In addition, the state court cases cited by petitioners are factually distinguishable from the instant case and do not create a conflict with the decision below.

A. THE DECISION BELOW WHICH FOUND NO SUBSTANTIAL NEXUS BASED UPON THE FACTUAL FINDINGS OF THE TRIAL COURT DOES NOT CONFLICT WITH ANY DECISION RENDERED BY THIS COURT

The Department argues that the decision below conflicts with the prior rulings of this Court because the lower court improperly concluded that Share had no substantial nexus with the State of Florida even though it

did more than communicate by mail or common carrier with its customers in Florida, and was present within the State with the intent to further its business activities therein. The argument is erroneous for several reasons. First, the Department's argument misconstrues the prior rulings of this Court. Further, the argument ignores the express factual findings of the lower court. For these reasons alone, the petition must be denied.

The issue raised in this case is governed by *Quill*, which decision reaffirms the doctrines and principles set forth in *Bellas Hess*. Both of these cases involved constitutional challenges to a tax assessment against the sales of a non-resident vendor who sold its products to residents within the taxing state solely through direct mail solicitation. This Court held in each instance that the vendor must have a "substantial nexus" with the taxing state sufficient to satisfy the Commerce Clause of the United States Constitution thereby preventing an undue burden on interstate commerce. *Quill*, 504 U.S. at 309; *Bellas Hess*, 386 U.S. at 756, 758-759. As acknowledged by the Department, both the *Bellas Hess* and *Quill* decisions held that a vendor must have a "physical presence" in the taxing state before the "substantial nexus" requirement would be satisfied and the obligation of collecting and remitting sales taxes could be imposed. (Pet., pp. 10-11). The "physical presence" required must be determined in each instance, and will often turn on whether the vendor has a "small sales force, plant or office . . . " in the taxing state. *Quill*, 504 U.S. at 315 (*citing Scripto, Inc. v. Carson*, 362 U.S. 207 (1960)).

The *Quill* and *Bellas Hess* decisions also established a "bright line" ruling which created a "safe harbor" for

vendors who do no more than communicate by mail or common carrier with its customers in the taxing state. *Quill*, 504 U.S. at 315. Within the "safe harbor," a vendor would be immune from taxation and not subject to scrutiny under any type of physical presence analysis. *Quill*, 504 U.S. at 314-315. In other words, the "bright line" rule of *Quill* and *Bellas Hess* holds that the "substantial nexus" requirement of the Commerce Clause was not applicable if the vendor's activities fell within the "safe harbor," and any tax assessed under these circumstances would be deemed unconstitutional. *Id.* It follows from *Quill* that if the vendor was "physically present" within the state, the determination would then be made in each given case whether such "presence" constituted a "substantial nexus" to justify taxation. *Quill*, 504 U.S. at 315. The decision below correctly applied the doctrines of *Quill* and concluded that Share's limited activities in Florida did not support a finding of substantial nexus.

The Department completely misconstrues the holdings of *Bellas Hess* and *Quill* by arguing that any nonresident who does more than communicate with their customers by mail or common carrier falls outside the "safe harbor" and is subject to taxation. (Pet., p. 14). Stated another way, the Department asserts that "bright line" equals "state line," and if the border is crossed, a vendor has a substantial nexus with the state and is subject to taxation. (Pet., p. 15). The Department further argues that the decision below, by requiring more, improperly adopted a "substantial physical presence" test in conflict with the prior decisions of this Court. (Pet., pp. 14-16). The argument is erroneous.

First and foremost, the Supreme Court of Florida never adopted a "substantial physical presence" test as the Department suggests.[1] The Florida Supreme Court never mentioned the terms "substantial physical presence" in its opinion and never implied that this was the applicable test. The terms were also never invoked by any of the lower courts' decisions. The Department's attempt to attribute authorship of such terms to the Florida Supreme Court is false and misleading, and a futile attempt to create controversy and conflict where none exists.[2]

In addition, neither the *Quill* or *Bellas Hess* decision supports the Department's argument. In fact, the plain language of *Quill* suggests quite the contrary. As mentioned above, when discussing the bright-line test, this Court in *Quill* stated:

> Like other bright-line tests, the *Bellas Hess* rule appears artificial at its edges: whether or not a State may compel a vendor to collect a sales or

---

[1] The Department misquotes the words "substantial physical presence" numerous times throughout its petition. The first improper quote appears within the question presented. (Pet., p. i). The mischaracterization also appears at various places throughout the petition.

[2] The Department also complained that the decision below failed to establish guidelines as to what type of contacts or activities would establish substantial nexus in the state. The criticism is similar to the reproach of Justice White in his concurring and dissenting opinion in *Quill* where he stated that "[r]easonable minds surely can, and will, differ over what is required to make out a 'physical presence' adequate to justify imposing responsibility for use tax collection. *Quill*, 504 U.S. at 330-31 (White, J., concurring in part and dissenting in part).

> use tax *may turn on the presence in the taxing State of a small sales force, plant or office.*

Quill, 504 U.S. at 315 (*citing Scripto, Inc. v. Carson*, 362 U.S. 207 (1960)). From this language it is plainly clear that the Court never suggested that by merely crossing over the state line a vendor would subject itself to taxation. In fact, this Court specifically rejected this notion when it stated that substantial nexus could not be found where only the "slightest presence" or insubstantial activity occurred within the taxing state. *Id.*, at n. 8 (*citing National Geographic Soc. v. California Bd. of Equalization*, 430 U.S. 551 (1977); *see also Miller Bros. Co. v. State of Md.*, 347 U.S. 340 (1954) (periodic delivery of products in taxing state not enough to constitute substantial nexus).

The Department further argues that because Share entered the State of Florida with the intent to further its business activities therein, its presence created a substantial nexus with the State. (Pet., pp. 14-15). The argument lacks legal and factual support. Even assuming, *arguendo*, that the intent of Share was relevant to the inquiry, the facts of this case preclude a finding that Share was within Florida for the purpose of exploiting its market presence therein. Indeed, the trial court specifically concluded:

> [T]he [Foundation] employees did nothing to further Share's market presence within the State of Florida. The [Foundation] employees merely collected money from paying customers, and did not solicit further customers while in the state . . . [M]ost of the chiropractors present at the seminar were from out of state, and had been long-standing customers of Share. . . .

> Thus, there was no 'exploitation of the consumer market' in Florida by these employees. . . .

Thus, as the trial court correctly found, Share did not enter the State of Florida for the purpose of furthering its business activities therein or expanding its market presence in the State.

Pursuant to the above, no conflict exists between the decision below and this Court's controlling precedent. As a result, no basis or justification exists for accepting jurisdiction over this matter, and the Department's petition for writ of certiorari should be denied.

B. THE STATE COURT DECISIONS RELIED UPON BY THE DEPARTMENT ARE FACTUALLY DISTINGUISHABLE FROM THE INSTANT CASE AND NOT IN CONFLICT WITH THE DECISION BELOW

The Department also complains that the decision below conflicts with various state court opinions addressing the substantial nexus requirement of the Commerce Clause. Specifically, the Department argues that the "substantial physical presence" test adopted by the court below involves application of a subjective balancing test that was previously rejected by this Court and several other state courts addressing the issue. (Pet., pp. 14-16). The argument is flawed from several angles.

First, as discussed above, the Supreme Court of Florida never adopted a "substantial physical presence" test. *See infra*, at p. 7. Rather, the Supreme Court of Florida

properly recognized that the bright-line test first enunciated in *Bellas Hess*, and later reaffirmed in *Quill*, served only to create a "safe harbor" free from taxation for those non-resident vendors whose only connection with the taxing forum was its mail order sales. *Id.* The Florida court also understood that the "slightest presence" of the non-resident vendor in the taxing state, without more, would not be sufficient to establish a substantial nexus for taxing purposes. The court properly concluded that a substantial nexus is something more than a "slight presence" and would have to be determined based upon the factual findings of each given case. This conclusion reached resulted from a proper application of the test enunciated in *Quill*, and creates no conflict.

Like the Supreme Court in the decision below, many state courts since *Quill* have been faced with the inquiry as to whether a vendor's contacts with the state create a substantial nexus to justify taxation against the sales made to customers within the state. Each of these state courts applied the "substantial nexus" test set forth in *Quill*, as did the Florida Supreme Court, and made a determination based upon the facts presented. Because of the nature of the inquiry, each of these state court decisions are confined to their own facts and do not, and cannot, create any conflict with the decision below.

The Department cites to the decision of *Orvis Co., Inc. v. Tax Appeal Tribunal*, 86 N.Y.2d 165, 86 N.E.2d 954 (1995), *cert. denied, Vermont Information Processing, Inc. v. Commissioner*, ___ U.S. ___, 116 S.Ct. 518, 133 L.Ed.2d 426 (1995) to support its argument that a conflict exists which necessitates this Court's review. The *Orvis* decision, however, is easily distinguishable from the instant case. In that

case, two separate vendors were contesting the constitutionality of a sales tax assessment by New York authorities. With respect to the first vendor, the Orvis Company, the New York court found substantial nexus based upon the fact that the vendor unrefutedly had established a substantial wholesale business within the taxing state by use of its sales personnel who directly solicited retailers in New York. *Orvis*, 86 N.Y.2d at 179. Specifically, the evidence showed that during a three year period, salesmen of the Orvis Company traveled into New York on 12 separate occasions, visiting 9 to 16 customers on each trip, which resulted in an increased market presence in the state of approximately 15%, or $500,000 in new sales. *Id.* The *Orvis* court, based upon these facts, concluded that the "substantial nexus" requirement had been met. Its decision is entirely consistent with the decision below.

The second vendor, Vermont Information Processing, Inc. ("VIP"), created a substantial nexus with the State of New York by making more than 41 trips into the state to assist its customers and made approximately 154 sales transactions during these troubleshooting trips. *Id.*, at 180-181. The evidence showed that unlike the facts in this case, the visits by VIP "enhanced sales and significantly contributed to [its] ability to establish and maintain a market for [its products] in New York." *Id.* Thus, based upon these facts, the *Orvis* court concluded that the vendors had more than a "slight presence" within the taxing state to justify taxation. There is nothing inconsistent about the *Orvis* decision in relation to the decision below.[3]

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[3] Although the *Orvis* court suggests that it is rejecting the test urged by the vendors because it would result in a case-by-

Likewise, the rulings in *Brown's Furniture, Inc. v. Wagner*, 171 Ill.2d 410, 665 N.E.2d 795 (1996), *cert. denied* ___ S.Ct. ___, 65 USLW 3252 (Oct. 7, 1996), do not conflict with the decision rendered by the Florida Supreme Court. In fact, the *Brown's Furniture* decision is in accord with the reasoning and legal applications adopted by the Florida Supreme Court. The court in *Brown's Furniture* acknowledged that the question left unanswered after *Quill* was the extent of physical presence needed to establish substantial nexus. *Brown's Furniture*, 665 N.E.2d 795, 802. In addition, the Illinois court recognized that the substantial nexus inquiry was one where "reasonable minds surely [would] differ. . . . *Id.*, *citing Quill*, 504 U.S. at 315. With that said, the *Brown's Furniture* court concluded that the regular and frequent deliveries by the non-resident vendor into the taxing state was sufficient to justify a finding of substantial nexus. *Id.* The vendor in *Brown's Furniture* made 942 trips into the taxing state during a 10-month period, which equaled "between 15 and 18 trips into [the taxing state] per month, or a minimum of about one every other day." *Brown's Furniture*, 665 N.E. 2d at 803. Most importantly, the court made reference to the decision below when it concluded that the contacts were not " 'occasional' or sporadic." *Brown's Furniture*, 665 N.E.2d at 804, *citing Florida Dept. of Revenue v. Share Int'l., Inc.*, 667 So.2d 226 (Fla. App. 1995), *rev.*

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case evaluation of the burdens imposed, the court's opinion reflects that such a review was implemented. For example, the court looked to both the contacts of each vendor and their effect on the vendors' market presence in the State of New York before it concluded that a substantial nexus existed. *Orvis*, 86 N.Y.2d at 179.

granted 668 So.2d 602 (Fla. 1996). Thus, the *Brown's Furniture* decision itself distinguishes the facts of *Share* from those before it. Surely, given this admission, the Department's argument that the *Brown's Furniture* decision creates any conflict with the decision below is futile.

The Rhode Island state court case cited by the Department is also easily distinguishable on its facts. *Koch Fuels, Inc. v. Clark*, 676 A.2d 330 (R.I. 1996), *cert. denied* ___ S.Ct. ___, 65 USLW 3288 (Oct. 15, 1996). In that case, the court found that a substantial nexus existed because the transactions sought to be taxed were consummated within the taxing state of Rhode Island. No such facts exist in the present case. Here, the Department is seeking to tax the mail order sales made by Share to customers within Florida, which sales were undisputedly consummated in Texas. Share paid taxes on all sales that were made during the seminars in Florida.[4] Moreover, in *Koch*, the court concluded that the vendor maintained "total control" over the 25.6 million gallons of fuel oil which it shipped into the taxing state, which was valued at approximately $18 million. The court's conclusion of

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[4] The Department also asserts in its petition that during the seminars Share took orders in Florida for later delivery in the state. (Pet., p. 6). Nowhere within the record of this case do facts exist that support the Department's assertion. In fact, the record is clear that Share paid taxes on all sales consummated in the State of Florida, (R-172). Many doctors at the seminars would, however, submit an order form that would later be accepted and filled in Texas to avoid the burden of transporting the materials back to their home state themselves. (R-176; R-185-186). There is no evidence to show that doctors from Florida acted in this manner.

substantial nexus was based upon these facts, and in no way conflict's with the findings of the decision below.

In summary, a review of the state court decisions relied upon by the Department in support of its petition reveal that each court made a factual determination that the substantial nexus requirement had been met and that the challenged tax was therefore constitutional under the Commerce Clause.[5] These decisions, rather than create a conflict, support the conclusion that the substantial nexus requirement must be resolved based upon the facts of each given case as mandated by the *Quill* decision.

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[5] The only other state court decision cited by the Department in its petition is the Kansas case of *In the Matter of Scholastic Book Clubs, Inc.*, 920 P.2d 947 (Kan. 1996). The Department acknowledges that the case is not applicable to the issues raised in its petition. However, the Department does note that the *Book Clubs* court made a finding of substantial nexus consistent with *Quill*. The ruling was made based on the court's conclusion that the non-resident vendor was conducting business in the taxing state through an in-state sales force of teachers who were engaged to solicit the students on a continuing basis throughout each given year. *Book Clubs*, 920 P.2d at 958. We do not have anything close to this type of presence in the instant case.

III. CONCLUSION

For all of the foregoing reasons, the Department's petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 96-647

IN THE
Supreme Court of the United States
October Term, 1996

THE DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA, A STATE AGENCY, AND LAWRENCE FUCHS, EXECUTIVE DIRECTOR OF THE DEPARTMENT OF REVENUE,

Petitioners,

v.

SHARE INTERNATIONAL, INC.,

Respondent.

BRIEF OF *AMICUS CURIAE*, DIRECT MARKETING ASSOCIATION, INC., IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Florida courts correctly applied the substantial nexus test in declining to impose use tax collection duties on a small mail order company which displayed and sold some of its materials at four brief seminars over a period of five years.

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BRIEF OF *AMICUS CURIAE*, DIRECT MARKETING ASSOCIATION, INC., IN OPPOSITION TO PETITION FOR CERTIORARI

INTRODUCTION

The Direct Marketing Association, Inc. respectfully submits this brief in opposition to the petition for *certiorari*. Written consents from the parties are filed herewith.

STATEMENT OF INTEREST

I. *DMA: An Overview*

The Direct Marketing Association, Inc. ("DMA"), a not-for-profit corporation, is the oldest and largest trade association representing mail order sellers and advertisers. DMA has over 3,200 members from all 50 states and 40 foreign countries. Most of DMA's members, like Respondent Share, are small businesses. Approximately 85% of DMA's members have annual sales of $10 million or less. Like Share, more than 20% employ fewer than four people, including "mom and pop" operations that still prepare catalogs on kitchen tables and in home offices.

Since the late 19th century, mail order marketing has attracted fledgling businesses and entrepreneurs who recognize the enormous opportunity of selling their products nationally. Through direct marketing, companies with limited resources, but ambitious aspirations, have been able to market their goods country-wide, despite most being located in areas removed from America's great urban centers.

II. *DMA's Interest In This Case*

Most of DMA's members sell by means of interstate commerce. They send catalogs and other advertising materials through the mail, receive orders by mail or telephone, and deliver goods by common carriers. DMA's members have been beneficiaries of the free and open trade created by the Constitution's Commerce Clause; therefore, DMA has a special interest in the Commerce Clause test for deciding when out-of-state sellers must collect and remit state and local use taxes on mail order sales.

In planning their business structure and activities, DMA's members have relied on a long line of Supreme Court decisions, including *Scripto, Inc.* v. *Carson*, 362 U.S. 207 (1960), *Na-*

tional Geographic Soc'y v. *Calif. Bd. of Equalization*, 430 U.S. 753 (1977), *Tyler Pipe Industries* v. *Wa. State Dept. of Revenue*, 483 U.S. 251 (1987), and *Quill* v. *North Dakota*, 504 U.S. 298 (1992). These decisions all hold that a direct marketer must have a "substantial nexus" with a state before burdensome use tax collection obligations can be imposed.

Over the years, the Court has rejected state efforts to lower the Commerce Clause threshold for use tax collection. *See, e.g., National Geographic Soc'y, supra*, 430 U.S. at 556 (rejecting California's effort to replace substantial nexus with a "slightest presence" test). Just four years ago in *Quill* v. *North Dakota*, this Court again reaffirmed its substantial nexus principle in the face of one state's effort to replace it with an ethereal "economic presence" approach.

Since *Quill* was decided, most state courts have had little problem in applying the substantial nexus standard. Yet, despite this, several state tax departments have attempted to erode direct marketers' Commerce Clause rights. This case is an example. In their brief before the Supreme Court of Florida, Petitioners invited that court to create a *new* constitutional rule under which *any* physical presence in the taxing state — no matter how brief or how slight — would create a substantial nexus. "It matters not," the Department unsuccessfully argued, whether an in-state presence lasts for "6 hours," or for "3 seconds or 3 days." (Department "Initial Brief," October 27, 1995 ("Dep. Brief") at 38). The Supreme Court of Florida, in a decision consistent with all of the recent decisions of its sister states, rejected this invitation to depart from *Quill*. Instead, it carefully reviewed the facts, analyzed governing Supreme Court precedent and applied the Court's decisions in a practical and commercially responsible manner. It properly concluded that Share could not be enlisted by Florida to collect and remit use taxes because of its extremely limited and infrequent contacts with the state.

Were this Court to adopt the Department's "trip wire" nexus test, the blow to DMA's members would be devastating. Such a

decision would undermine the objectives of Commerce Clause jurisprudence and inhibit interstate business generally. It would impose burdens incommensurate with the minimal presence reflected in this case. As this Court recognized in *Quill* v. *North Dakota*, if one state succeeds in weakening the substantial nexus rule, other states and localities are bound to follow suit. Use tax obligations "might be imposed by the Nation's 6,000-plus [tax] jurisdictions," forcing direct marketers to cope with "many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements, . . . [which] could entangle [direct marketers] in a virtual welter of complicated obligations." 504 U.S. at 313 n.6 (citation omitted) (quoting *National Bellas Hess* v. *Ill. Rev. Dept.*, 386 U.S. 753 (1967)). An avalanche of audits, subpoenas, assessments, and lawsuits would follow.

The Department's proposed new nexus standard would undoubtedly be enforced against direct marketers for prior tax years — just as Petitioners are attempting to do against Share. Enormous back tax assessments, including disproportionate amounts of interest and penalties, would confront direct marketers throughout the country — with unforeseen and potentially bankrupting consequences.

STATEMENT OF THE CASE

The facts found by the trial court were never challenged or modified. Among them, Share, an out-of-state mail order company, had national gross sales of $3 million a year, and participated in four seminars in the State of Florida over the course of a five-year audit period. These seminars took place each November of 1986, 1987, 1988, and 1989, and lasted no longer than three days. All four seminars, which were neither organized nor run by Share, were designed to attract chiropractors from outside of Florida. Fully 84% of the attendees were

from out of state. Aside from these seminars, Share had no contact with Florida. Petitioners dispute none of this.

At these four weekend seminars, Share displayed and sold some of its products, the majority of which were written materials. Share voluntarily collected the Florida sales tax on those sales under a seller's permit obtained for that specific purpose, remitting an average of $7,855.98 in taxes per seminar. As the trial court later found, Share neither intended to establish nor created a customer base in Florida by its involvement with these seminars. During proceedings below, Petitioners fully accepted these factual findings.

The Department assessed Share for sales and use taxes for 1985 through 1990, contending that Share's presence at the seminars obligated the company to collect and remit use taxes on its mail order sales. Notably, the assessment covered the 12-month period *prior to* Share's first attendance at a three-day seminar in November of 1986. The assessment also covered all of 1990, likewise a year in which Share attended *no* seminars in Florida. Share successfully filed an action to declare the assessment unconstitutional.

REASONS FOR DENYING THE WRIT

This case involves whether Share had a sufficient physical presence in Florida to obligate it to collect and remit Florida use taxes. The United States Supreme Court addressed this issue just four years ago in *Quill Corp.* v. *North Dakota*, 504 U.S. 298 (1992). *Quill* reaffirmed that, before such duties can be imposed, the Commerce Clause requires companies like Share to have a substantial nexus with the taxing state. Like virtually every state court since *Quill*, the Supreme Court of Florida understood and applied this Commerce Clause test in a fair and reasonable way and concluded that the substantial nexus requirement had not been met. DMA accordingly believes that a grant of *certiorari* is unwarranted.

I. The Petition Repeatedly Misstates That The Courts Below Applied A "Substantial Physical Presence" Test When, In Fact, Those Courts Utilized *Quill*'s "Substantial Nexus" Test.

Petitioners' hopes for *certiorari* are pinned on repeated and serious misstatements regarding the decisions below. The petition repeatedly *misquotes* the courts as having applied a "substantial physical presence" test to Share, rather than *Quill*'s "substantial nexus" test. These misquotations occur from one end of the petition to the other; from the Question Presented on page i to Petitioners' final description of the case on page 24.[1] These inaccurate quotations and improper characterizations of the lower court decisions are misleading and confusing.

To set the record straight, the courts below never invoked, referred to, or applied a "substantial physical presence" test. Those words do not appear in their decisions. Rather, the courts below correctly applied the substantial nexus standard to this case. By repeatedly intoning the irrelevant phrase "substantial physical presence," the Petitioners would have this Court believe that this case cries out for the extraordinary privilege of Supreme Court review. It does not.

II. The Petitioners' Request To Erect A New Commerce Clause Standard Should Be Denied.

In proceedings below, Petitioners urged the lower courts to impose use tax collection obligations on the basis of a trip-wire physical presence test. In the Petitioners' own words, dipping "one toe" is enough; entering Florida for "3 seconds or 3 days" is enough; a brief airport encounter will do. (Dept. Br. at 24 n.15, 38). This Court previously rejected a similar effort to

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[1] On 11 occasions in their brief the Petitioners misquote the Florida courts in this way. (Petition For Writ of Certiorari ("Petition") at i, iv, 11, 15, 16 (twice), 17, 18 (three times), 24.)

eviscerate the Commerce Clause's "substantial nexus" test. *National Geographic Soc'y* v. *Cal. Bd. of Equalization*, 430 U.S. 551, 556 (1977) (expressly refusing to adopt a "slightest presence" test urged by California).

In this case, Share's business crossed the border and entered Florida only four times during the course of a five-year tax period, each time to display and sell goods at one three-day seminar. To date, this Court has never based a finding of substantial nexus on so thin a reed. The courts below recognized this and correctly held that "[t]he display of products by Share during three days at a seminar is not enough to create a 'substantial nexus' so as to allow the imposition of a sales tax against all future mail order sales. . . ."[2]

Petitioners' new test — that *any* in-state presence, irrespective of its nature, purpose or effect, creates constitutional nexus — conflicts with well-developed and clearly enunciated Commerce Clause jurisprudence.

As recently as 1992, the Court observed that not every physical presence equals substantial nexus. *Quill Corp.* v. *North Dakota*, 504 U.S. 298, 315 n.8 (1992). In its *National Geographic* decision, the Court, in affirming a finding of substantial nexus, explained that substantial nexus means more than a minimal or sporadic relationship with a state and its consumer market. The Court carefully advised that its

> affirmance of the California Supreme Court [imposing use tax collection obligations] is not to be understood as implying agreement with that state's "slightest presence" standard of constitutional nexus. Ap-

[2] Here, Petitioners assessed Share for a full year prior to its first seminar presence and for a full year after the last seminar. Such an attempt to create retroactive and prospective "nexus," for periods in which *no* in-state presence exists, has no support in any of the decisions of this Court or in the Florida tax statutes. It also reflects a cavalier attitude about expanding the state's tax authority.

> pellant's maintenance of two offices in the State and solicitation by employees assigned to these offices of advertising copy in the range of $1 million annually . . . *establish a more substantial presence than the expression "slightest presence" connotes*. Our affirmance thus rests upon our conclusion that appellant's maintenance of the two offices in California and activities there establish a relationship or "nexus" between the Society and the State that renders constitutional the obligations imposed upon appellant. . . .

430 U.S. at 556 (emphasis added). Subsequent Court decisions underscore that both the *nature* and *extent* of the in-state presence must be examined to determine if a substantial nexus exists, a routine factual analysis which the lower courts understood and carefully applied.

For example, in *Scripto, Inc.* v. *Carson*, 362 U.S. 207, 211-12 (1960), the Court explained that the test for nexus "is simply the nature and extent of the activities of the appellant in Florida." Indeed, in 1987, this Court quoted with approval the Supreme Court of Washington's observation that a "crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are *significantly associated with the taxpayer's ability to establish and maintain a market in this state for [its] sales*." *Tyler Pipe Industries* v. *Washington State Dept. of Revenue*, 483 U.S. 232, 250 (1987) (quoting lower court) (emphasis added). Clearly, Petitioners' one-toe-over-the-state-line approach contrasts sharply with such decisions and the Commerce Clause values they reflect.

In Supreme Court cases where the requisite nexus has been found, the nature and extent of the in-state presence have far exceeded this case and have been closely tied to the establishment of a local market. In *Scripto*, for example, the taxpayer had ten resident sales brokers conducting year-round, continu-

ous solicitation of Florida residents. 362 U.S. at 211. And *Scripto*, the Court has observed, is the furthest "constitutional reach to date" of the substantial nexus test. *Quill Corp.* v. *North Dakota*, 504 U.S. at 306. *Accord National Bellas Hess, Inc.* v. *Dept. of Revenue of Illinois*, 386 U.S. 753, 757 (1967) ("the furthest constitutional reach to date . . . is *Scripto*").[3]

In the case at bar, the trial court held an evidentiary hearing and found (1) that Share's presence in Florida was extremely limited (a total of 12 days over a five-year period); (2) that Share's display of products at four professional seminars neither created nor was intended to create a Florida market for its products; and (3) that 84% of the seminar attendees resided outside of Florida. While Share sold some of its materials to seminar attendees, these sales — over 80% of which were not to Florida residents — accounted for just 0.7% of the company's total yearly gross sales. Moreover, Share obtained a seller's permit and collected and remitted Florida's sales tax on these limited seminar sales.

The clear factual findings in this case show that, unlike in *Tyler Pipe, supra*, Share's limited presence in Florida was not "significantly associated with [its] ability to establish and maintain a market in this state for [its] sales." *Tyler Pipe*, 483 U.S. at 250. To the contrary, the trial court below found that such contacts had *no* connection to Share creating a customer market in Florida. This finding is reinforced by the nature of the professional seminars in which Share participated. They were neither organized, promoted, nor attended with local markets in mind. They were interstate events in the purest sense. It would be inappropriate, from both a practical and a constitutional sense,

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[3] *See also Standard Pressed Steel Co.* v. *Washington Dept. of Revenue*, 419 U.S. 560, 561 (1975) (full-time employee with year-round office in Washington calling on in-state customers and monthly customer and prospect visits by team of engineers); *Tyler Pipe, supra*, 483 U.S. at 250 ("substantial" activity of in-state sales representatives working "daily on behalf of Tyler Pipe in calling on its customers and soliciting orders").

to allow such inherently interstate seminars to serve as a hook for state and local tax collection duties on unrelated mail order sales.

III. No Conflict Exists Among The Lower Courts As To Substantial Nexus.

Petitioners' false claim of a conflict among state courts arises from their misstatement of the nexus test applied below. Only by incorrectly reporting that "[t]he decision of the Florida Supreme Court adopted a 'substantial physical presence' standard" do Petitioners create the misimpression of a "conflict with decisions of sister states." (Petition at 18.) In each instance cited by Petitioners, the New York, Illinois, and Rhode Island decisions are consistent with *Share*.

In *The Orvis Company, Inc.* v. *Tax Appeals Tribunal*, 630 N.Y.S.2d 680, 688, 654 N.E.2d 945 (1995), *cert. denied sub nom., Vermont Information Processing, Inc.* v. *Commissioner*, ___ U.S. ___, 116 S.Ct. 518 (1995), Orvis engaged in "systematic visitation to all of its as many as 19 wholesale customers on the average of four times a year" over a three-year audit period (*i.e.*, as many as 228 customer visits over a three-year period each for an indeterminate length of time). The New York Court of Appeals based its finding of nexus not only on the frequency and continuity of these in-state sojourns, but also on the fact that Orvis' wholesale business in New York depended upon such "direct solicitation of retailers through visits to their stores in New York." 630 N.Y.S.2d at 687. The considerable factual differences between Orvis and Share — both as to the nature and extent of the in-state presence — reasonably led to different results.

In the companion case to *Orvis*, a Vermont computer system dealer ("VIP") repeatedly sent employees into New York — at least 41 times over three years — to provide after-order

services to its major New York customers, and solicited new customers based upon promises of providing in-state training and services. It was rational for the New York Court of Appeals to conclude that VIP, unlike Share, had a systematic in-state presence which "significantly contributed to VIP's ability to establish and maintain a market for computer hardware and software it sold in New York." 630 N.Y.S.2d at 688 (citing *Tyler Pipe, supra*).

Likewise, in *Brown's Furniture, Inc.* v. *Wagner*, 665 N.E.2d 795 (Ill.), *cert. denied*, ___ S.Ct. ___, 65 USLW 3252 (1996), the taxpayer used its own trucks to make 942 trips to Illinois customers during a ten-month audit period. "Testimony at trial," the court observed, "indicated that during a typical trip into Illinois, Brown's Furniture might make as many as five or six individual deliveries." 665 N.E.2d at 803. In finding a substantial nexus, the Supreme Court of Illinois readily distinguished *Brown* from cases like *Share*:

> Thus, during the audit period, Brown's Furniture was averaging between 15 and 18 trips into Illinois per month, or a minimum of about one every other day. We believe that by sending its representatives into Illinois on this *regular* and *frequent* basis, Brown's Furniture has established more than a slight physical presence within the State.

665 N.E.2d at 803 (emphasis added). These factual distinctions between *Brown* and *Share* naturally support different outcomes.

Finally, the taxpayer in *Koch Fuels* v. *Clark*, 676 A.2d 330, 334 (R.I.), *cert. denied*, ___ S.Ct. ___, 65 USLW 3288 (1996), owned and maintained "total control" over 25.6 million gallons of fuel oil sold in Rhode Island and valued at $18 million. The finding of substantial nexus was based upon such control, the Rhode Island Supreme Court explained, and also the "unique nature of the cargo." *Id.* Moreover, Koch itself

had voluntarily registered to do business in Rhode Island on a full-time basis and filed yearly income tax returns with the state reporting in-state earnings. Clearly, the facts of *Koch* are distinguishable from the minimal presence reflected in *Share*.

CONCLUSION

In *Share*, the Supreme Court of Florida applied a common sense approach to substantial nexus in a case which involved only a fleeting in-state presence. Other state courts have done the same and, by doing so, have avoided imposing use tax obligations vastly disproportionate to the minimal presence of direct marketers like Share. By carefully reviewing the facts and circumstances of each case and assessing the significance of the in-state contacts, these courts have achieved consistent and fair results. Only by manufacturing discord out of harmony do Petitioners create the impression that the "substantial nexus test" is unworkable without further Court intervention. To date, that has simply not been the case.

Respectfully submitted,

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